IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 310

JOSEPH CARROLL, ET AL.,
Petitioners,
vs.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF NATIONAL ASSOCIATION OF ORCHESTRA LEADERS.

SHAYLE P. FOX,
LAWRENCE M. COHEN,
38 South Dearborn Street,
Chicago, Illinois,

SAMUEL H. YOUNG,
LAWRENCE H. EIGER,
135 South LaSalle Street,
Chicago, Illinois,
Attorneys for Amicus Curiae, National Association of Orchestra Leaders.

Of Counsel:
LEDERER, BARNHILL & FOX,
38 South Dearborn Street,
Chicago, Illinois.

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BRIEF AMICUS CURIAE ON BEHALF OF NATIONAL ASSOCIATION OF ORCHESTRA LEADERS.*

INTEREST OF THE AMICUS CURIAE.

The National Association of Orchestra Leaders (NAOL) is the parent organization of several local associations of orchestra leaders who are the owners and operators of sole proprietorships, partnerships and corporations engaged in supplying live music to purchasers. The leaders generally conduct the orchestras which bear their respective names. NAOL has joined with its affiliate, Orchestra

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* Pursuant to Rule 42, ¶ 2 of the Rules of the United States Supreme Court, there have been lodged with the Clerk of the Court the written consents of counsel for the respective parties herein to the filing of this Brief Amicus Curiae.

Leaders Association of Northern Illinois (OLANI), and with some 27 orchestra leaders and a purchaser of music as plaintiffs in the case of *National Association of Orchestra Leaders, et al.* v. *American Federation of Musicians*, Civil Action No. 67-C-917, in the United States District Court for the Northern District of Illinois.* Named as defendants in the suit are the American Federation of Musicians (AFM), the Chicago Federation of Musicians Local 10-208, AFM (CFM), 19 orchestra leaders and four booking agents. Counts I and II of that complaint allege that the defendant orchestra leaders, who compete with the plaintiff leaders, combined and conspired with each other, with the defendant unions and with the defendant booking agents to restrain the trade of the plaintiffs and monopolize the industry.

The concern of the amicus is that this Court, in formulating legal principles to resolve the issues in the above titled case, should be aware that the record before it reflects the trade practices and industry conditions in only one area of the country and that the conduct of leaders and AFM locals in other areas may have additional or different antitrust ramifications.

The purpose of this brief is to discuss the basic issues which, we believe, are common to both the instant matter and the Chicago litigation, and to apprise the Court of the differences between the two cases.** The essential determination in both cases goes not merely to the various restrictive practices and rules of the defendant unions, but to the entire present relationship between orchestra leaders, as businessmen, and the unions, as organizations of both employees and businessmen.

* Hereinafter referred to for convenience as "the Chicago case."

** This brief and the Chicago case are largely concerned with the economic position of orchestra leaders in the so-called "club date" field and similar situations where the leader, as an independent contractor, sells a service to purchasers of live music.

The thesis of this brief, and the prayer for relief in the Chicago complaint, may be summarized thus: The policy of the Sherman Act* requires that orchestra leaders, as entrepreneurs, be allowed (or, as the case may be, required) to compete freely. It therefore violates the most basic antitrust concepts when unions which, in this case, are actually trade associations assimilated into labor organizations, regulate the purely commercial decisions and functions of leaders. To reconcile the Sherman Act's proscription of restraints of trade and the Clayton Act policy of protecting legitimate labor union objectives, the decision of this Court should recognize that leaders are entrepreneurs and, as such are not proper subjects of union membership and control. The separation of leaders from the AFM and its locals would place the parties in the traditional respective positions of labor and management and would dissolve the forum and the machinery of the combination by which restraints of trade among the leaders are effectuated.

QUESTIONS PRESENTED.

Within the myriad of issues raised by the cross-appellants are three which go to the essential functions of a labor organization and the extent to which it can lawfully demand the membership of businessmen, thereby regulating, without any pretense of collective bargaining, their individual economic, business and competitive decisions.

1. Are orchestra leaders in the "club date" field independent businessmen and, hence, subject to the antitrust laws?

2. Assuming that orchestra leaders are businessmen (and employers), do Sections 6 and 20 of the Clayton Act**

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* 15 USC §§ 1 and 2.

** 15 USC §17 and 29 USC § 52.

and Section 4 of the Norris-LaGuardia Act* exempt their association with and participation in labor organizations which insulate them from competition by regulating entrepreneurial and competitive economic functions that do not concern or affect their employees?

3. Given the status of the leader as a risk taker and owner of a goodwill peculiarly dependent upon his skill and personality, is there any real or practical job or wage competition between the leader and his employees which justifies the leader's membership in a labor organization?

SUMMARY OF ARGUMENT.

By every social standard and economic measure, orchestra leaders are independent entrepreneurs rather than wage earners employed in a master-servant relationship. Leaders bear the risks, costs and responsibilities of business enterprise and are compensated by profits, rather than wages. Notwithstanding the fact that leaders are businessmen, they are required to be members of the AFM and its locals which control, in great detail, their entrepreneurial functions and decisions. Thus, in essence, the union is a mixture of the characteristics of a trade association and a labor union. The Court of Appeals found that the price fixing activities of the defendant Local 802 were beyond the scope of the labor exemptions of the Sherman Act. But price fixing is only a single illegal activity. The unlawful nature of a trade association in the clothing of a union lies at the heart of this entire litigation and the Chicago case. With respect to its leader members, the AFM is a horizontal combination of competing businessmen who are bound by membership to agreement on or acquiescence in rules which regulate the competition among them. The force of competition and independent economic decision by each leader

* 29 USC § 113(c).

can be restored only by a complete severance of leaders from the union. The argument that leaders are in job and wage competition with their employees and must therefore be regulated by the union to protect its interest ignores the economic realities of the industry. The ability of the orchestra to attract and retain purchasers of music (and thereby create employment for musicians) is entirely dependent upon the reputation, skill and personality of the leader; the goodwill of the business is personal to him. When a purchaser of music contracts with a leader, he generally expects that leader, not an unknown employee, to lead or play that engagement. Thus, the leader cannot displace an employee because the leader's presence is essential to the particular contract and to the future continuity of the business.

ARGUMENT.

I.

ORCHESTRA LEADERS ARE INDEPENDENT BUSINESSMEN AND ENTREPRENEURS.

The initial determination to be made by this Court concerns the position of the orchestra leader in the economic structure of the industry. The NAOL contends that orchestra leaders are entrepreneurs within every existing economic and social criteria, and, as such, are subject to the operation of the antitrust laws.

The Court of Appeals* distinguished between "club date" engagements such as weddings and parties, which comprise the bulk of live music employment,** and those relatively infrequent situations where the union has entered directly into a collective bargaining agreement with a hotel*** or recording company. According to the court,

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* *Carroll* v. *American Federation of Musicians of the United States and Canada, et al.*, 372 F. 2d 155 (2d Cir., 1967).

** Both lower courts found it necessary to define the industry terminology as to the different types of musical engagements. Unfortunately, the terminology, like so many industry practices, is not uniform throughout the country. An example is the confusion over the terms "club date," "single" and "steady" engagement. As the Court of Appeals observed, club date single engagements provide most of the employment for musicians. However, club date type engagements in Chicago are also contracted on a steady basis, and are identical to single club date engagements except that they last longer than one week. Therefore, for purposes of this brief, the term "club date" engagement will include steady as well as single engagements where the purchaser deals with and pays the leader who in turn hires, supervises and pays his sidemen.

*** Such agreements are generally not found in Chicago hotels or those in other major cities, and it appears that even New York hotels contract for music on a "club date" basis. A leader will contract to supply his orchestra for extended periods of time and will hire employees for the engagement in the same fashion as a "club date".

these agreements treat the leader as an employee with little distinction between the leader and the sidemen, each of whom are paid individually by the recording company.*

However, the court found that in the "club date" field, the orchestra leader is an employer and an independent contractor whose "remuneration is the difference between his costs . . . and the amount received from the music purchaser" (372 F. 2d at 159); in other words, a profit. Compensation in the form of profit is perhaps the most important indicia of a businessman observed by the court, although it is by no means the only entrepreneurial characteristic of a leader. The leader is a businessman and employer who differs from other entrepreneurs only in the sense that his peculiar business goodwill is more closely related to his skill and professional personality than might be true in other industries. The entire business entity of the orchestra, its reputation, its ability to attract new customers and repeat business from old customers depends upon the leader. The leader's skill with his instrument, the style of music which he establishes for his orchestra, and his personality on the stage constitute the "commodity" which he is selling. Stan Kenton, one of the best known "name" orchestra leaders described the unique attachment of his business success to his own personality, as follows:

* Aside from the existence of a collective bargaining agreement and the fact that the recording company pays the leader and sidemen individually, there is no substantive difference between recording and club date engagements.. The leader still hires the sidemen, conducts and determines the orchestra's style and performance. Moreover, although the recording company pays sidemen's wages and deducts taxes, these costs are "advances" to the leader against his royalties from the record. If the record does not meet the leader's satisfaction, it is never released. (Tr. 1080.) The entire transaction with respect to the leader is on a profit or loss basis, not a salary. The leader is in no way an employee of the recording company despite the fictional master-servant relationship contemplated by the wording of the agreement. (Tr. 1198-1203; 1518-1519; 1536-1542.)

"Q. Would you be able to characterize the style or musical flavor of your orchestra?

A. Well, I think that my orchestra, like other orchestras, reflects my personality in music. It is the way I think music should be performed, and it is what I believe I have done to make my music, which is a commodity, a saleable commodity. It would be very awkward to stand in front of an organization you didn't believe in, so it has to reflect me." (Tr. 1030.)

In practical business terms, this skill and personality are the trademark of the enterprise. This is characteristic of the industry and it is as elementary to a "name band", *i.e.* one with a national reputation, as it is to a small orchestra known only in a particular city or region. (Tr. 1351, 1605.) In either case, the purchaser of music is completely unconcerned with what sidemen play the engagement; he chooses a particular band because of its leader.

In function, the orchestra leader is the economic risk taker: his compensation is the difference between costs and selling price. In addition, he has an investment in music stands, a music "library" of arrangements (frequently worth several thousand dollars), lights, uniforms, a vehicle, etc. (Tr. 566; 1164-65.) The leader also expends funds for advertising his orchestra to potential purchasers (Tr. 412) which, like the office he maintains (Tr. 1428; 411; 567), are overhead costs that do not necessarily vary with the volume of business. Moreover, the leader assumes the risk of the purchaser's credit; his expenses, including his sidemen's wages, deductions and taxes must be met, regardless of whether the purchaser pays for the orchestra as per the contract. Finally, the leader is an employer: he hires the sidemen, instructs them,

disciplines them, and, if their work is unsatisfactory, dismisses them.* (Tr. 492-93; 567; 570.)

Cutler v. *United States,* 180 F. 2d 360 (Ct. Cl., 1960) was a suit by an orchestra leader for refund of federal unemployment compensation taxes. The Court of Claims observed that the purchaser of music dealt only with the leader, who was in the business of furnishing musical services. The leader was retained to supply a number of musicians playing a certain type of music under the leader's supervision; the individuals who played in the band were of no concern to the purchaser. The court described the role of the leader *vis a vis* the purchaser as follows:

> "The purchaser was interested in the leader, not in the individual musicians, except in rare instances. The leader had established a reputation of putting on good performances. Because of this he was employed, not because of a certain man who played the violin or the trombone. What violinist or trombone player was to be employed was the leader's responsibility. The purchaser was interested only in the overall effect, in the montage, not the individual pictures.
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> "It was plaintiff, and not the purchasers who were in the business of providing music at social functions. *The success of this business depended on plaintiff's ability and reputation as a musician. He is the one who bears the loss and gains the profit.*" (180 F. Supp. at 362, 363, emphasis supplied.)

Other decisions have reached the same conclusion in different contexts. See *Cutler* v. *American Federation of Musicians,* 316 F. 2d 546 (2d Cir., 1963); *Carroll* v. *American Federation of Musicians,* 295 F. 2d 484, 486 (2d Cir., 1961).

The Court of Appeals held (372 F. 2d at 159) "that

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* *Associated Musicians of Greater New York, Local 802, AFM,* 164 NLRB No. 8 (1967); *Chicago Federation of Musicians, Local 10, AFM,* 153 NLRB 68 (1965); *American Federation of Musicians of The United States & Canada,* 165 NLRB No. 110 (1967).

orchestra leaders are employers in the club date field." However, the orchestra leader is more than an employer; he is also a businessman, operating an enterprise for profit in competition with other orchestras. The fact that a leader is an employer and is also a union member creates a possible violation of Section 8(a) (2) of the National Labor Relations Act* but, in itself, does not determine whether such affiliation also violates the antitrust laws.** Antitrust liability turns upon the leader's economic role not merely as an employer, but as an entrepreneur, and upon the union practices or rules which govern his business options. Given the entrepreneurial functions and characteristic of orchestra leaders, their combination in an ordinary trade association and their agreement, express or implied, within the association on various anti-competitive rules would clearly violate the Sherman Act. If such an association and agreements violate the antitrust laws, the trappings of union membership cannot provide immunity for an otherwise illegal arrangement.

II.

DEFENDANT UNIONS, IN CONJUNCTION WITH BUSINESSMEN, MONOPOLIZE AND RESTRAIN TRADE IN THE INDUSTRY.

In every restrictive union practice or regulation is the participation or acquiescence, either coerced or voluntary, by orchestra leaders as businessmen. Notwithstanding the status of leaders as businessmen, they are required by union fiat to be members of the union, on pain of being unable to engage sidemen, utilize the services of booking agents, or solicit customers. The AFM and its local affili-

* 29 USC § 158(e) (2).

** Certain conduct can, of course, violate both the antitrust and labor laws; the statutory violations and remedies are not mutually exclusive.

ates control almost every aspect of the music industry; union membership is virtually a prerequisite to doing business as an orchestra leader in the United States. This does not mean, however, that all leaders are coerced into joining the union. A number of leaders, as the Court of Appeals noted (372 F. 2d at 162), enjoy an advantage in diminished competition, and cooperate willingly with the union or directly participate in formulating price and other trade rules.

It is significant for antitrust purposes that the monopoly achieved by the AFM and its locals is not merely a "closed shop"*, a term in labor law pertaining only to union membership as a prerequisite to employment. With respect to leaders, the AFM represents an economic monopoly of businessmen organized in what is essentially a trade association. Equally significant are the substantial number of union regulations and practices which concern matters affecting only leaders and only in the entrepreneurial rather than labor-management aspects of their businesses. Several examples may be given: AFM By-Laws, Article 25, regulates in detail the terms of all transactions between leaders and booking agents, although agents never have any dealings with subleaders or sidemen. (530-31.) The so-called "Form B" and "Miscellaneous Musical Services" contracts require disclosure of information far beyond the wages or working conditions of employees. The contracts require disclosure of information such as the name of the purchaser and the price charged for the engagement.** The

* The court's statement that forcing leaders to be union members is exempt as a legitimate union concern for a "closed shop" (372 F. 2d at 167 and 168) is contrary to Sec. 8(a)(3) of the National Labor Relations Act, (29 USC § 158(a)(3)).

** Clearly, no trade association could lawfully require such information from its members. Indeed, voluntary disclosure of price information to competitors under certain conditions has been held to violate the Sherman Act. *American Column & Lumber Co.* v. *United States*, 257 U. S. 377 (1921); *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553 (1936).

By-Laws and "price lists" of the various locals require that the cost of certain items, such as transportation and uniforms, must be passed on to the purchaser, rather than being absorbed in whole or in part as the leader sees fit. (CFM Rules & Regulations, August, 1965, AFM By-Laws, Art. 16.) The locals impose a minimum number of musicians for an engagement depending upon the "class" of the place where the engagement is to be played, and the leader's "fee" varies with the number of sidemen required for an engagement. Regulations concerning traveling orchestras severely restrict the conditions under which the leader may solicit new business. (AFM By-Laws, Arts. 16 and 17.) Certain regulations forbid leaders from giving any inducement to prospective purchasers, another dictates the termination provisions of contracts between traveling leaders and purchasers. (AFM By-Laws, Art. 16, §§ 15 and 20.) One by-law even requires the leader to obtain permission from the president of the AFM before borrowing money for business purposes. (AFM By-Laws, Art. 25, § 23.)

In Chicago, the conspiracy between the leaders *inter se* and with the union is, we believe, more visible than in the instant record. Rules and regulations are passed upon by the Board of Directors and are enforced by the Trial Board of Local 10-208, both of which include orchestra leaders named as defendants in the Chicago case. Thus, a number of businessmen are able to agree among themselves and with the union to directly restrain the trade of their competitors by controlling prices and other trade practices which are the essence of competition. The record in the instant case does not indicate this degree of active participation by New York leaders in formulating the terms which restrain competition; it appears that most leaders in New York simply agree or are coerced into accepting the union imposed restraints. This is not to say, however, that

the record herein does not contain evidence of more active participation. Emil Paolucci is an orchestra leader who is also president of Local 38 (Larchmont) and a member of Locals 802 (New York City) and 402 (Yonkers). (Tr. 729.) Inasmuch as each local promulgates a price list, Mr. Paolucci's role in formulating prices for the Larchmont area is obvious. In addition, his membership in Locals 802 and 402 gives him at least a vote on their price lists. Mr. Paolucci is insulated from competition from Local 802 leaders because Local 38's prices are lower than 802's and union regulations require an 802 leader playing in another jurisdiction to charge the highest price (plus 10% for certain types of engagements) between the two locals. (AFM By-Laws, Article 15.) Whatever competition does enter Larchmont can be carefully watched by Mr. Paolucci since he has access to contracts containing prices and purchasers' names. (Tr. 755-56.) The testimony of AFM president Herman Kenin indicates that Mr. Paolucci's situation may not be unique. Mr. Kenin stated that leaders can be officers of locals, and thus can initiate price fixing and other restraints on competition. (Tr. 141-142.) Agreement on prices among leaders was also indicated by Al Manuti, President of Local 802, who testified that leaders attended price meetings and frequently presented resolutions concerning prices. (Tr. 252.)

The commercial orientation of many of these rules is perhaps best indicated by the following standing resolutions in Local 802's by-laws (Ex. CJ, pp. 75-76):

> "A. Caterers, banquet managers and others connected directly or indirectly with halls, hotels and all similar establishments which provide facilities for public or private functions, are prohibited from engaging leaders or musicians, for such affairs.
>
> "C. The payment or promise of payment, or any gift or consideration whatever, to the above is contrary to the principle of fair competition among mem-

bers of this local, and any member guilty of such offense shall be fined not more than Five Hundred Dollars ($500.00) or suspended, or both."

Resolution A, which forbids one class of businessmen (leaders) from dealing with another class of businessmen (caterers), calls for nothing more or less than a concerted refusal to deal, *i.e.*, a boycott. Resolution C refers to "fair competition", a concept which usually connotes the economic combat among businessmen to obtain customers. Nothing in either resolution suggests an effect, present or potential, on employees; both statements, by their terms, are addressed to business transactions.

The matters dealt with in the by-laws and regulations, like the prohibitions in Resolutions A and C, concern only the leader's conduct of his business in competition with other leaders. There is no direct or vital interest of the employees in the subject matter of these rules. Neither the examples cited above nor the other commercial rules of the AFM and its locals can be reasonably defined as relating to "terms and conditions of employment." This Court, in *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965), examined the ambit of legitimate union concerns. Mr. Justice White phrased the issue thus:

> "Whether the marketing hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions . . . [that it] falls within the protection of the national labor policy . . .". (381 U. S. at 689, 690.)

Thus, this Court has indicated that agreement at least with with respect to prices, even in collective bargaining, violates the Sherman Act. This Court, we believe, should reach a similar conclusion with respect to horizontal agreements without collective bargaining concerning other purely business responsibilities.

III.

THE COURT OF APPEALS ERRED IN PERMITTING THE DEFENDANT UNIONS TO RETAIN CONTROL OVER LEADERS.

The decision of the Court of Appeals misconceives the relationship between the unions and their leader members; it is inconsistent in finding a Sherman Act violation in the price fixing issue, but concluding, on the other hand, that leaders are properly the subject of union membership. At the outset, the basis upon which the court found that the plaintiffs do not represent a true class within the meaning of Rule 23(a)(1), FRCP, pinpoints the involvement of orchestra leaders in an almost classic *Allen-Bradley** employer-union combination:

> "It is apparent that the present case does not qualify as a true class action under Rule 23(a)(1). It was brought by orchestra leaders as a direct challenge to the unions' control in the music industry, but there is evidence that many orchestra leaders are willing members of the union and subscribe to its policies; and there was no evidence offered by the appellants that such a group did not exist. *Indeed, the unions' price-fixing programs would assure those who are less successful and well-known of earning at least the union fee when they work instead of the lower sum they might get under free competition. The desire to protect their interests gives them the same motivation that generates most horizontal price-fixing arrangements. Similar economic benefits to orchestra leaders are inherent in other of the unions' regulations, for example, the restrictions on traveling engagements."* (372 F. 2d at 162, emphasis supplied.)

In this holding, the court spells out the basic motives of

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* *Allen-Bradley Co.* v. *Local Union No. 3, International Brotherhood of Electrical Workers,* 325 US 797 (1944).

leaders who, actively or passively, have joined the combination, *i.e.* the opportunity to avoid the rigors of competition. The court correctly observed that the price lists are "horizontal price-fixing arrangements." However, it appears that the court then contradicts itself by holding "... the price list is established *unilaterally* by Local 802" (372 F. 2d at 160, emphasis supplied), and finding no conspiracy between the unions and the leaders to restrain trade.

It is difficult to accept the concept of "unilateral" union action on prices because, for all practical purposes, the price minimums are the result of agreement, express and implied, among businessmen under union direction. The rationale of the finding that price fixing is a *per se* violation of the Sherman Act beyond the scope of lawful union activity creates a significant inconsistency in the Court of Appeals decision. The term "unilateral" implies action solely by the local sans any agreement or combination with other parties to effectuate the price mandate. The court apparently failed to recognize that price fixing, by definition, cannot be a unilateral action; the violation of Section 1 of the Sherman Act lies in the *agreement* on prices or the combination which reaches the unlawful result. *Socony-Vacuum Oil Co.* v. *United States*, 310 U. S. 150, 222 (1940). The *per se* doctrine applies to the particular type of restraint agreed upon; but the doctrine necessarily assumes the fact of an agreement. Thus, for example, price fixing, market allocation and boycotts have only the objective of eliminating competition and, therefore, are *per se* (or conclusively presumed) unreasonable restraints of trade. *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 5 (1958). However, Section 1 of the Sherman Act prohibits agreements in unreasonable restraint of trade, and one cannot agree with oneself. Hence, purely unilateral action

cannot violate the Act, even if it concerns something as *per se* unreasonable as prices.

In condemning price fixing by Local 802, the court by implication must have condemned an agreement to fix prices. Such an agreement could only have been entered into between the leaders and the union. The court noted the motivation of certain leaders to adhere to union established prices and similar competitive restrictions. The court also acknowledged that other leaders are coerced into agreement and refers to the votes taken on price lists by the membership of the local, which includes leaders. The inclusion of leaders in these decisions forms the unlawful combination.

However, even assuming that the leaders merely acquiesced in the uniform price minimums and other restraints established by the union, their conduct would violate the Act under the rule of *Interstate Circuit* v. *United States*, 306 U. S. 208 (1939). Since each leader knew that his competitors would adhere to the established prices, the consequences under Sherman 1 would be the same as if they had expressly and simultaneously agreed on such prices. In this sense, the acceptance by leaders of prices and other restraints dictated by the union falls directly within the *Interstate Circuit* doctrine:

> "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. (Citing cases.) Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequences of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." (306 U. S. at 227.)

In *Northern California Pharmaceutical Assn.* v. *United States*, 305 F. 2d 379 (9th Cir., 1961) cert. den. 371 U. S. 862 (1962), the Ninth Circuit noted that uniform drug price

lists, although widely distributed by the defendant Association, were not necessarily adhered to by pharmacists who received them. Nonetheless, the court found a violation of the Sherman Act in the preparation and dissemination of the lists, because of their purpose and tendency to create price uniformity. In both those cases, the absence of active or overt agreement did not affect the illegality of the conduct in question. In the instant matter, if, as the court stated, the leader's remuneration is actually a profit, and if the union's regulations concerning profits, solicitation and customer relations insulate the leaders from competition, then it follows that such restrictions are really business restraints, not the product of a "labor dispute". As such, they are subject to antitrust proscriptions when agreed upon by businessmen, even if the businessmen did not originate the restraints. *Allen-Bradley Co.* v. *Local Union No. 3, supra,* 325 U. S. at 799.

But the major inconsistency in the decision is the disparity between the basis of the court's finding on price fixing and its approval of union coercion to require leader membership. It would seem that the rationale which denies the labor exemption to price fixing by leaders and a union must also require that leaders, as businessmen, be disassociated from the organization which fomented not only price agreements but a host of other purely commercial restraints as well.

In ruling that union price regulations could not be justified under the "labor dispute" criteria, the court differentiated between the respective roles of leader and sideman in the club date field and the "contracting out" problem arising from the close relationship of an employee-driver's wages and the rental paid to independent driver-owners performing the same job, as in *Local 24, IBT* v. *Oliver,* 358 U. S. 283 (1959). The court stated:

"The circumstances constituting a possible threat to the employment of subleaders or the displacement of a sideman in the present case are not at all comparable. Nor is there any authority for holding that an employer must bargain on a labor union's demand that the employer perform no work himself which an employee could do. Moreover, many leaders become so because of their skill and reputation in playing certain instruments and their performances with their orchestras enhance the demand for the orchestras and provide more work for employees rather than less as is the case of 'contracting out.' " (372 F. 2d at 166.)

Thus, the court determined that there is no meaningful job or wage competition between leaders and their employees because leaders must lead in order to maintain their businesses. However, two pages later (372 F. 2d at 168) the court concludes that pressure on orchestra leaders to join the union reflects a legitimate labor interest in a closed shop, "and is not to be confused with cases in which labor unions have imposed membership upon employers who do not present job threats to union members." (372 F. 2d at 168.) This is totally inconsistent with the earlier finding that there is insufficient wage, job or other economic relationship between leaders and sidemen or subleaders to justify price fixing. Moreover, the failure of the Court of Appeals to find an illegal conspiracy or combination inherent in the association of the leaders with the union legitimizes, under the "mandatory subjects of bargaining" rubric, agreements among the leaders on matters such as minimum employment classifications (to which the leader's price is tied) and travel restrictions. Both matters are within the ambit of legitimate union concern as subjects on which the parties must bargain. However, if these areas become the objects of a combination or conspiracy between businessmen and a union, they cease to be exempt. *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965).

The court also concludes that, absent a conspiracy, the union's travelling restrictions, employment quotas and its regulation of booking agents do not violate the Sherman Act because the national labor policy demands that the parties be free to bargain about them. (372 F. 2d at 165, 166.) The difficulty with this conclusion is a) the evidence of combination and conspiracy between businessmen *inter se* and with union, and b) the fact that there is no freedom for orchestra leaders in determining the various economic issues, because they are governed by union rules, rather than by bargaining.

Considering the extent of regulation by the union of business decisions and functions often as unrelated as prices to "terms or conditions of employment," and the anti-competitive benefits which accrue from union affiliation, the very structure of this combined labor and trade association, not just its price fixing activity, is subject to attack under the antitrust laws. Membership of leaders, whether voluntary or coerced, stifles competition in a wide range of business functions and limits the economic freedom of leaders as businessmen, which the Sherman Act protects.

IV.

THE LABOR EXEMPTION APPLIES TO WAGE EARNERS AND EMPLOYEES, NOT TO INDEPENDENT ENTREPRENEURS.

Section 6 of the Clayton Act states that "the labor of a human being is not a commodity or article of commerce" and that labor organizations cannot "be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." But in several decisions, this Court and the lower courts have made it clear that the statutory language was meant to apply to labor unions involved in disputes which concern the employer-employee

relationship and the welfare of their members as employees.* Thus, the benefit of the exemption has been denied to combinations of individuals dealing as entrepreneurs in the sale of goods and services, *vis a vis* wage earners employed by others. This distinction between commercial enterprise and employee, in the instant matter, goes not only to whether the various AFM rules and practices concern "mandatory subjects" of bargaining, but, equally important, whether the leaders who participate acquiesce or are coerced into the combination are within the ambit of the Clayton Act exemptions.

In *United States* v. *The National Association of Real Estate Boards*, 339 U. S. 485 (1950), suit was brought by the Government to enjoin six defendants from engaging in a conspiracy to fix real estate broker commissions within the District of Columbia, under a code of ethics which called for maintaining a schedule of fees. The defendants claimed that the business of a real estate agent was not within the purview of "trade" as used in Section 3 of the Sherman Act. This Court differentiated between "labor" as used in Section 6 of the Clayton Act and the application of the term "labor" to entrepreneurs, saying:

> "Members of the Washington Board are entrepreneurs. Some are individual proprietors; others are banks or corporations. Some may have no employees; others have large staffs. But each is in business on his own. The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of "trade" within the meaning of Section III of the Act. The Act was aimed at combinations organized and directed to control of the market by suppression of competition 'in the marketing of goods and services.' " (339 U. S. at 490.)

* While the labor-management relationship is the object of the statute's protection, the parties to the dispute need not actually be each other's employers or employees. 29 U.S.C. § 113(c).

In *United States* v. *Women's Sportswear Mfgrs. Assn.*, 336 U. S. 460 (1949), this Court held that stitching contractors, although furnishing chiefly labor, were possessed of all the characteristics of business such as rents, capital costs and profits, and hence were entrepreneurs, not mere laborers. In *Women's Sportswear,* the restraints of trade agreed upon among the contractors were embodied in an agreement with the jobbers for whom they worked. The contractors' association contended that union shop provisions insulated the otherwise clearly unlawful agreements from Sherman Act prosecution. The interjection of a union shop, however, could not save the conspiracy even though contractors' employees or the union incidentally derived some benefit from the restraints agreed upon.

Liability under the Sherman Act for agreements among commercial enterprises is not altered by the fact that the restraining agreements are entered into under union auspices or that the entrepreneurs are union members. The few cases dealing with Sherman Act combinations of businessmen within a union appear to turn on whether the individuals involved are wage earners or entrepreneurs whose profit has no meaningful effect on wages, hours or working conditions. The axiom that entrepreneurs, simply by joining a union, cannot benefit from the economic power which inures to labor organizations as representatives of wage earners was established in *Columbia River Packers Association* v. *Hinton,* 315 U. S. 143 (1942). There, the Pacific Coast Fisherman's Union, acting as bargaining agent for its fishermen members, required packers to buy fish only from "union" fishermen at prices set by a collective bargaining agreement. Although affiliated with the C. I. O. and including in its membership some of the fishermen's employees, the union, in this Court's view, was basically an association of businessmen. The crux of the decision is an examination of the independent and profit oriented

nature of the fishermen as opposed to wage earners. The Court observed that the fishermen were not the processors' employees; they owned or leased their boats "and carry on their business, uncontrolled by the petitioner or other processors." (315 U. S. at 145.) Moreover, their dispute with the processors concerned prices, the compensation of an entrepreneur, not wages. The Court held that membership of fishermen's employees in the union was not relevant:

> "That some of the fishermen have a small number of employees of their own, who are also members of the Union, does not alter the situation. For the dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours or other terms and conditions of employment of these employees." (315 U. S. at 147.)

The description of the fishermen in the district court's decision in *Columbia River** is a worthwhile comparison to many of the small orchestra leaders who, like Arthur Flatte, have other daytime occupations:

> "The fishermen in this case were not employed by plaintiff in the sense of employment as meant by the Norris-LaGuardia Act. Their time was their own, many of them following other occupations out of fishing season. Some were farmers, many did not fish regularly, but only when the prices and run were satisfactory. All provided their own boats and gear, either as owners or lessees, the value of the boats and gear running from one hundred dollars to fifteen thousand dollars. Some owning the larger and more valuable boats were themselves employers, hiring others to fish for them." (34 F. Supp. at 976.)

The *Columbia River* decision turns primarily on the mercantile nature of the fishermen's occupation and the fact that the dispute concerned a commercial matter, the

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* *Columbia River Packers Assn. v. Hinton,* 34 F. Supp. 970, 976 (D. Ore., 1939).

price of a commodity. Both the district court and this Court emphasized the distinction between wage earners banded together in a union and a combination of individuals whose products or services were sold to the public for a price on a profit and loss basis.

A similar holding is found in *Ring* v. *Spina*, 148 F. 2d 647 (2d Cir., 1945). There, the Dramatists Guild, an organization of almost every playwright in the country, established a body of rules not unlike those in question here. Producers and managers who purchased plays could not do so unless they were "in good standing" with the the Guild. All transactions were covered by the "Basic Agreement" which fixed minimum prices, minimum advances and royalties. The Agreement also forbade outright sale of plays to radio or television before stage presentation and established mandatory arbitration. The Guild president described the Basic Agreement as "a minimum collective bargaining agreement . . . designed to produce a fair return for the labor of its members who write plays for a living." (148 F. 2d at 651.)

The Court of Appeals rejected this characterization of the agreement and the claim that the conduct was exempt on three grounds: First, there was no employer-employee relationship:

> ". . . while the parties to the dispute may not always be employers and employees, yet the exception will not apply unless an employer-employee relationship is 'the matrix of the controversy'." (148 F. 2d at 651.)

The court found that authors were more like the fishermen in *Columbia River* or the doctors in the *AMA* case* than employees banded together in a union, since they were not employed by the producers. Second, the prices and royalties paid by producers for plays were not wages, but

* *American Medical Association* v. *United States*, 317 U. S. 519 (1943).

rather were the terms of sale of a finished product. Finally, "no wages or working conditions of any group of employees are directly dependent on these terms." (148 F. 2d at 653.) The situation was thus similar to that involved in the instant case: Leaders, like the authors in *Ring,* sell services, and many of the union regulations concern not an employer-employee, but a seller-buyer, relationship in which leaders, as sellers, compete for the patronage of music purchasers in the club date field.

A more recent decision following the *Ring* thesis is *Taylor* v. *Local 10, Internaional Union of Journeyman Horseshoers,* 353 F. 2d 593, (4th Cir., 1965.) Plaintiffs were trainers and owners who sued to enjoin price fixing and boycotts of trainers who did not use union farriers. The restraints were initiated by a union whose membership consisted of independent horseshoeing contractors. The defendants admitted that their conduct violated the Sherman Act, but contended that they were exempt under Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act. There, as here, a labor organization had instituted the restraints on behalf of its members, and, therefore, the court was required to determine whether the union members were employees of trainers for purposes of the "labor dispute" test or whether, as in *Ring* and *Columbia River,* the members were independent contractors. The court first examined the basic agency question of the extent to which the trainers controlled the shoeing process, then turned to the indicia of business enterprise which belied the farriers' claim of employee status. Farriers themselves controlled when they worked and for whom; they owned their tools and transporting vehicles; they advertised, extended credit, and employed apprentices. Moreover, the court found that the farriers and trainers in the ordinary course of trade regarded the relationship as one of independent contractor and customer. The Court of Appeals therefore concluded

that the controversy was not a "labor dispute" within the judicial interpretations of the Norris-LaGuardia Act.

The argument is advanced that the labor exceptions protect certain agreements with non-labor groups, even if a restraint of trade incidentally results. This Court, in *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965), seems to have answered that question. The subject of the collective bargaining agreement in question was wages, probably the most basic of legitimate union concerns. However, the purpose and effect of the agreement was to impose such wages on other employers, thereby eliminating them from the field. This created the violation of the Sherman Act, nowithstanding the obvious benefit to the union.* The contract, in the opinion of Mr. Justice White, was indistinguishable from a union induced agreement with the producers to set prices or a collusive bidding arrangement. The restraint in such situations would be direct, the benefit to the union would be at best remote. Conversely, a legitimately negotiated wage increase directly benefits the union, but the resulting effects on the product market from increased costs do not warrant Sherman Act proscription in absence of a conspiracy with businessmen who, as in *Pennington,* would profit by the increase.

This Court made it clear that there is no *carte blanche* exception, even with respect to mandatory subjects, where the combination between the union and businessmen restrains trade to the benefit of the employers. Thus, the elimination of competitors outside the bargaining unit by agreement with the union was held to violate the antitrust laws. The concurring opinion in *Pennington,* while it dis-

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* See also, *Philadelphia Record Co.* v. *Manufacturing Photo-Engravers Assn. of Philadelphia,* 155 F. 2d 799 (3rd Cir., 1946) involving the use of the union interest in hours of work to restrain trade outside the context of a labor dispute.

agreed with certain aspects of the majority decision, found that *Allen-Bradley* applied when "organized labor joined hands with organized business to drive marginal operators out of business." (381 U. S. 674.) Both the majority and concurring opinions assumed an economic benefit to the large operators from the elimination of their smaller competitors outside the agreement.

In the present case, the economic benefits from union membership and participation or acquiescence in union established industry rules are obvious. The benefits accruing to certain orchestra leaders are not necessarily *Pennington*-type predatory restraints in the elimination of competing leaders. The benefit to the non-labor group in the live music industry is the elimination of competition, rather than competitors; but the consequences for the purposes of antitrust policy are identical.* Moreover, in the club date segment of the industry, one cannot speak of respective benefits in a collective bargaining context, because the rules of the combination forbid bargaining. The commercial restraints previously noted occur as a result of union fiat and leader agreement or acquiescence without any trace of the arms-length employer-employee interchange contemplated by the national labor policy.

* See also, *United Brotherhood of Carpenters and Joiners* v. *United States*, 330 US 395 (1947). In *Lumber Products Association, Inc.* v. *United States*, 144 F. 2d 546, 549 (9th Cir., 1944) the court held that the indictment charged restraint of trade not "merely incident to . . . a protracted labor dispute and necessary to the achieving of a legitimate objective of organized labor." The restraint was the result of a union management combination agreeing to use the union's power to destroy competition, give the employer a monopoly, and thereafter "split the take." Cf. *Adams Dairy Co.* v. *St. Louis Dairy Co.*, 260 F. 2d 46 (8th Cir., 1958) where a wage increase in a contract with a union negotiated at arms length incidentally increased the cost and price at which the plaintiff could sell milk in the St. Louis area.

V.

THERE IS NO PRACTICAL OR REAL JOB OR WAGE COMPETITION OR OTHER ECONOMIC INTERRELATIONSHIP BETWEEN LEADERS AND SUBLEADERS OR SIDEMEN.

The justification advanced by defendant unions for the horizontal restraints of trade agreed upon under their direction is that leaders are in job and wage competition with sidemen and subleaders. The argument is made that labor organizations have a legitimate interest in protecting their members, and that the various restraints are instituted in furtherance of that interest. The argument assumes, however, that leaders can and do displace their employees who, but for the leader's presence on the stage, would be employed in the leader's stead. The District Court's finding that leaders displace subleaders and sidemen (241 F. Supp. at 872) is clearly erroneous on this point. To accept the displacement thesis, one must ignore the economic realities of the live music industry and the unique function of the leader as the operating head of his enterprise. The live music industry has certain peculiar characteristics not usually found in other fields. One of these peculiarities is that, in most cases, the success of the orchestra as a commercial venture is personal to the leader. The purchaser of music usually neither knows nor cares about the identity of the sidemen or the details of providing music. He has hired the orchestra on the basis of the leader's skill and reputation and depends solely upon the leader to put together and present the engagement. *Cutler* v. *United States*, supra, 180 F. Supp. at 362, 363.

Judicial interpretation of business conduct and its antitrust consequences has always been marked by an attitude of pragmatism. The practical effect of the activity in ques-

tion on antitrust policies and objectives has been considered the critical factor in determining its legality. For example, in considering whether a particular activity affected interstate commerce for Sherman Act purposes, this Court noted:

> "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." (*Swift & Company* v. *United States,* 196 U. S. 375, 398 (1905).)

And in holding that the private legal obligations of a transaction could not govern its antitrust consequences, this Court said:

> "Here we have an antitrust policy expressed in Acts of Congress. Accordingly, a consignment no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy." (*Simpson* v. *Union Oil Company,* 377 U. S. 13, 18, 1964).

Here, the theory of job or wage competition between leaders and their employees is a technical rather than a practical concept when taken in the light of Congressional objectives in the antitrust laws and the Clayton Act exemption. The theory ignores not only the necessary role of the leader in the continued success of the business, but also the true relationship between the leader, his employees, and the purchaser of music. It is obviously impossible to assert that never, at any time or in any place will a situation exist where a leader displaces a sideman or subleader. Such situations, in an industry whose hallmark is lack of uniform industry practice, may occur from time to time. However, defendant unions have the burden of proof in claiming the benefit of an exemption from the antitrust laws, and they have failed to meet that burden. *Javierre* v. *Central Altagarcia, Inc.,* 217 U. S. 502, 507 (1910); *United States* v. *McKesson & Robbins,* 351 U. S. 305, 310

(1956). The extensive hearings produced no evidence that any leader really displaced or threatened to displace an employee just to avoid a union wage scale or similar union benefit. The occasional practice of some leaders using subleaders when they are unable to be present cannot be said to create a threat of employee displacement in the industry. The defendants must demonstrate a practical state of job and wage competition (or other economic relationship) between individual leaders and their employees for the funds expended by the purchaser of music. The pragmatism which governs antitrust policy, and for that matter the protection of unions by the Clayton Act, demands more than an abstract or theoretical concept of economic relationship between leaders and subleaders or sidemen.

In drawing the line between entrepreneur and employee, we do not imply that there are no situations where an independent contractor does not come within the Clayton Act exemption. The Supreme Court in *Columbia River* specifically distinguished the case before it and its holdings in *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U. S. 552 (1938)* and *Milk Wagon Drivers Local 753* v. *Lake Valley Farm Products, Inc.,* 311 U. S. 91 (1940), "for in both cases the employer-employee relationship was the matrix of the controversy" (315 U. S. at 147). In *Milk Wagon Drivers,* the so-called "vendor" drivers were treated by their contract with the dairies as employees and the contract so stated. Moreover, the "vendors", although independent contractors in that they owned their own vehicles, were in fact displacing union dairy employees, thus creating direct job competition in milk deliveries from which the union sought to protect its members. This Court, on those facts, found a "labor dispute".

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* *New Negro Alliance* v. *Sanitary Grocery Co.* was not an antitrust case, but involved the anti-injunction provisions of the Norris-LaGuardia Act.

The fact situation in *Local 24, IBT* v. *Oliver,* 358 U. S. 283 (1959) is similar to *Milk Wagon Drivers* and, therefore, is not analogous to the instant case. Article 32 of a collective bargaining agreement governed wages and rentals in situations where the carrier leased a vehicle which the lessor also drove. The article, by its terms, made the lessor/driver an employee of the carrier who retained control over the manner and details of his performance. The article provided that the driver must receive union wages and that the rental of the vehicle could not be less than its operating cost which would, in effect, lower the wages of the lessor/driver below union scale. The Court held that Article 32 in fact dealt with wages, a mandatory subject of collective bargaining. As the Court observed, Article 32 was limited specifically to situations where the lessor drove his own vehicle; it did not apply when the driver leased a vehicle, but someone else drove. The evidence showed that owner/driver leasing had been abused by the carriers as a method of lowering the effective wage structure. The Court also observed that this was "of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service." (358 U. S. at 294.) Finally, unlike the AFM rules, the agreement in *Oliver* did not attempt to negotiate a profit for the owner-driver, a matter outside the union's responsibility. In *Oliver* and *Milk Wagon Drivers,* the independent contractors stood in an "employee" relationship to the employer of their services, because in both cases, the independent contractor could and, in fact did, perform the very duties ordinarily assumed by the company's regular drivers. In both cases, independent contractor indicia were outweighed by detailed evidence that the contractor had actually assumed an employee status. Moreover, because the job in question, *i.e.,* driving a truck, could be

performed by either a contractor or a regular employee, there existed an economically real danger of job displacement.

The relationship between the orchestra leader, his sidemen and the music purchaser is totally different than that of drivers to carriers or dairies. It is true that in rare instances a leader may hire a subleader to perform in his absence. Carroll and Petersen were forced to do this because of union pressure on their sidemen and purchasers when they were expelled from the AFM. But these are exceptions; most orchestras simply do not exist without the leader. His skill and reputation create jobs for his employees, but none of them can really replace him. At the top of the club date field are the so-called "name bands", such as Stan Kenton. (384-440.) The dependence of these bands on the "name" leader is obvious. As an abstract proposition, one could argue that these name leaders, when conducting or playing an instrument, are filling a job requirement that could be filled by any other subleader or sideman and therefore displace potential employees. It is obvious, however, that these leaders become and remain "names" by their continual presence at the head of their bands, and the purchaser who pays for Stan Kenton will be greatly dissatisfied with an unknown subleader.*

There are, however, many leaders whose reputations are not nationwide, but who, nonetheless, have built a reputation among customers and potential customers in a small geographic area. Many of them advertise or depend upon word of mouth and repeat business from satisfied customers. On a much lesser scale, these leaders are "names"

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* A few large organizations such as Myer Davis book a number of engagements simultaneously and therefore must use subleaders. (351; 357-358; 363.) Davis himself, however, personally conducts a "first string" orchestra for certain single engagements. Such organizations are rare in New York and are virtually unknown elsewhere in the country.

in the sense that they cannot substitute an unknown subleader or sideman for themselves. The purchaser, even when he contracts with the leader of a small band, expects that the music he is buying will be played under the direct, on-stage supervision of the leader and with the conducting and/or instrumental skill of that leader. The potential for an employer to substitute an independent contractor for an employee performing the same function is not comparable to the hypothetical potential for displacement of a subleader or sideman by a leader.* The Court of Appeals recognized this when it observed that the "contracting out" problem in *Oliver* did not exist in the club date field:

> "The circumstances constituting a possible threat to the employment of subleaders or the displacement of a sideman in the present case are not at all comparable. . . .
>
> "*Moreover, many leaders become so because of their skill and reputation in playing certain instruments and their performance with their orchestras enhance the demand for the orchestras* and provide more work for employees rather than less as is the case of "contracting out." (372 F. 2d at 166, emphasis supplied.)

But the Court of Appeals would not apply these facts, by which it found a *per se* violation of the Sherman Act in the price-fixing issue, to the broader questions in this case. As noted previously, the court had to find an agreement to find a price fix, and it had to find that leaders were busi-

* On the opposite end of the spectrum from the name band is the sideman who, two or three times a year, at the request of friends or relatives, gathers a few sidemen and, for an evening is an orchestra leader. These are clearly not professional leaders and admittedly are not entrepreneurs in the sense that we have used that term. However, assuming, as did the District Court (Finding 35) that such persons compete on occasion with full-time leaders, they have entered the commercial arena and are no more entitled to union price protection when they temporarily act as businessmen than are full time entrepreneurs. Like the seasonal fisherman in *Columbia River*, the sideman who bids for an engagement as a leader temporarily becomes a seller, not a wage earner.

nessmen, because only businessmen are compensated by a price; employees are paid wages. If the orchestra leader is an employer and businessman, and if the leader does not represent a "contracting out" danger which would exempt price fixing, it follows that leaders should not be union members. For union membership by leaders is tantamount to their joining a horizontal combination to restrain trade in a variety of competitive aspects of their respective businesses.

With respect to this broader issue, the most significant decision is *Los Angeles Meat & Provision Drivers Union* v. *United States,* 371 U. S. 94 (1962) because there the sole question before this Court was the validity of a lower court decree ordering the union to terminate the membership of all self-employed "grease peddlers". The antitrust responsibility for various union practices had already been disposed of below, so the issue of union membership was more or less a "pure" one; that is, no questions of the relationship of particular union practices to "terms and conditions of employment" were involved.

Grease peddlers were self-employed middlemen whose profit derived from the spread between the cost of restaurant grease and the price at which it was resold to processors, less such costs as operating their trucks. In 1954, at the instigation of a union business agent, most of the grease peddlers in Los Angeles joined the union for the purpose of fixing an increased spread between the cost and sale prices of grease. These prices were enforced by union officials who threatened strikes and boycotts against processors who dealt with non-union peddlers. The business agent allocated territories and customers among the peddlers, who agreed not to solicit each others' customers. Violations of the agreement were punishable by suspension of the offending peddler from the union, which would effectively prevent the peddler from carrying on his business.

This Court held that there was no showing of job or wage competition between the contractors and the processors' employees in picking up grease. The stipulation between the parties stated that no processor had ever substituted a contractor for an employee or ever threatened to do so. The processors' employees obtained grease from large restaurants and hotels; essentially different sources than those of the contractors.*

The district court had ordered termination of the grease peddlers' union affiliation because that remedy was "the most effective, if not the only, means of preventing a recurrence of defendants' unlawful activities". There was no question, in this Court's view, that a court of equity had the power to dissolve a trade association being used as a forum for a conspiracy to violate the antitrust laws. This Court held that the "simple expedient of calling themselves 'Local 626-B' of a labor union" would not immunize these businessmen from the operation of the Sherman Act. As in *Columbia River,* the grease peddlers, as sellers of a commodity, had joined the union to effectuate an unlawful combination. This was not a *Milk Wagon Drivers* or *Oliver* situation where the union might have a legitimate interest in the membership of self-employed entrepreneurs. The circumstances before this Court were not those of a "labor dispute", but rather "an illegal combination between businessmen and a union to restrain commerce." (371 U. S. at 102.)

United States v. *Fish Smokers Trade Council, Inc.,* 183 F. Supp. 227 (S. D. N. Y., 1960) involved the question of severing independent contractors from union membership.

* The opinion also noted that the independent contractors were treated separately within the union, but this does not appear to have been the determining consideration in the opinion. The result would not have been different if the price fixing, customer allocations, and boycotts had been agreed upon by the union and peddlers within the general membership of the organization.

The smokehouses sold fish to jobber wholesalers who, in turn, sold to retailers. Some of the smokehouses also had their own retail customers and employed "chauffeurs" for such deliveries. The complaint asked injunctive relief "directing the defendant union to sever or expel from membership all jobbers engaged in the buying and selling of the fish for their own account." (183 F. Supp. at 229.) The issue before the court was whether the jobbers constituted a "labor group" which competed with the chauffeurs and affected their wages, hours and conditions of employment. The court noted that no such effect was shown to justify forcing the jobbers to be union members. The jobbers, although they picked up and delivered fish, also chose which smokehouses they would purchase from, which fish they would select for their customers and the price and profit at which they would sell to their retail customers. The jobbers extended credit and suffered the loss of non-payment. They worked their own hours and employed "helpers" to assist them in their work. The court found that there was no evidence of a vendor system to avoid union scales as was the case in *Milk Wagon Drivers*:

> "While a jobber and a chauffeur employee perform identical physical work, one has sole discretion in the performance of this work while the other just follows his employer's orders." (183 F. Supp. at 231.)

The court concluded that "there was no competition in any respect between the chauffeurs and the jobbers . . . although the physical aspect of the work of these two groups are similar, 'the economic and social difference between them lies in the method of compensation in return for their toil.' *People* v. *Distributors Division*, 169 Misc. 225, 7 N. Y. S. 2d 185, 187." (183 F. Supp. at 235.) So here, the economic and social differences between leaders and subleaders or sidemen, not the marginal similarities

of their physical work, ought to determine the validity of the job and wage competition defense.

In the instant case, the regulation of purely business functions by the unions in combination with the leaders can be effectively corrected only by the termination of leaders from union membership. A limited remedy, well within the *Los Angeles Meat Drivers* and *Fish Smokers* decisions, would separate the businessmen from the union and would leave to the parties the ordinary labor-management methods of solving their labor disputes.

CONCLUSION.

The flaw in the Court of Appeals decision is that it stopped short. The court found, for purposes of the price fixing issue, all the elements of the *Los Angeles Meat Drivers* and *Columbia River* situations. The court noted all the factors that make leaders entrepreneurs, that eliminate the job competition justification, and the benefit which leaders derived from the union's price fixing rules. But restraints of other types and restrictions on competition among leaders inherent in their union membership were treated in completely different manner. If orchestra leaders are businessmen, they should not be union members.

Respectfully submitted,

Shayle P. Fox,
Lawrence M. Cohen,
Samuel H. Young,
Lawrence H. Eiger,
Attorneys for Amicus Curiae, National Association of Orchestra Leaders.